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In the Supreme Court of the United States

OCTOBER TERM, 1991

THE COLORADO DEPARTMENT OF SOCIAL SERVICES, PETITIONER

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Medicaid statute requires a State to show, under penalty of a partial loss of funding, that it has inspected each of a certain class of medical facilities in the State by conducting an annual review of the medical care provided each Medicaid recipient in those facilities. The statute also provides a safe harbor with respect to facilities not inspected if the State can show, *inter alia*, that it exercised "good faith and due diligence in attempting to conduct" the required inspections. 42 U.S.C. 1396b(g)(4)(B). The question presented is whether the Secretary of Health and Human Services reasonably interpreted this "good faith" and "due diligence" statutory safe harbor as requiring a State to show that it "would have succeeded [in conducting a 100% review] but for events beyond its control which it could not have reasonably anticipated." 42 C.F.R. 456.653(a)(3) (1990).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-23) is reported at 928 F.2d 961. The oral opinion and order of the district court (Pet. App. 25-36) and the decision of the Departmental Appeals Board (Pet. App. 39-54) are both unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1991. The petition for a writ of certiorari was filed on June 20, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Medicaid program established by Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, the federal government provides financial assistance to participating States to reimburse facilities for health care provided to qualified Medicaid recipients. To receive federal Medicaid funds, each participating State must make a "showing satisfactory to the Secretary" that it has "an effective program of medical review of the care of patients" in certain facilities in the State "whereby the professional management of each case is reviewed and evaluated at least annually by independent professional review teams." 42 U.S.C. 1396b(g)(1). See also 42 U.S.C. 1396a(a)(26) and (31). The reviews are referred to as "utilization control inspections." A State failing to inspect all eligible facilities within its borders is subject to a reduction in federal payments (generally one-third of the Medicaid funds that were supplied to the State for care in the uninspected facility for the quarter in which the failure to inspect occurred). See 42 U.S.C. 1396b(g)(5).

The statute provides a safe harbor for States that fail to complete all required inspections:

> The Secretary shall find a showing * * * to be satisfactory, * * * if the showing demonstrates that the State has conducted such an onsite inspection during the 12-month period ending on the last date of the calendar quarter—
>
> > (i) in each of not less than 98 per centum of the number of such hospitals and facilities requiring such inspection, and
> >
> > (ii) in every such hospital or facility which has 200 or more beds,

> and that, with respect to such hospitals and facilities not inspected within such period, the State has exercised good faith and due diligence in attempting to conduct such inspection, or if the State demonstrates to the satisfaction of the Secretary that it would have made such a showing but for failings of a technical nature only.

42 U.S.C. 1396(g)(4)(B). The Secretary has promulgated regulations implementing these requirements. See 44 Fed. Reg. 56,333, 56,335-53,336, 56,339 (1979), promulgating 42 C.F.R. 456.653 *et seq.* The regulations define "good faith and due diligence" as full statutory compliance "but for events beyond [the State's] control which it could not have reasonably anticipated." The regulations also define "failings of a technical nature" to include all "circumstances within the [State's] control" but permit correction of such failings only "within 30 days after the close of the [calendar] quarter" at issue. 44 Fed. Reg. 56,335-56,336 (1979).

2. In the Spring of 1988, when the events at issue in this case took place, the above inspection, penalty, and safe harbor provisions applied to persons receiving "skilled nursing facility care or * * * care in a mental hospital" (42 U.S.C. 1396a(a)(26) (1982))[1] and persons receiving care in an "intermediate care facility" (42 U.S.C. 1396a(a)(31) (1982)).[2] The

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[1] "Skilled nursing facility services" were defined as "services which are or were required to be given an individual who needs or needed on a daily basis skilled nursing care (provided directly by or requiring the supervision of skilled nursing personnel) or other skilled rehabilitation services which as a practical matter can only be provided in a skilled nursing facility on an inpatient basis." 42 U.S.C. 1396d(f) (1982).

[2] An "intermediate care facility" was generally defined as "an institution * * * licensed under State law to provide, on a

1987 Omnibus Budget Reconciliation Act (OBRA) eliminated skilled nursing facilities and most intermediate care facilities from the scope of the inspection, penalty, and safe harbor provisions with respect to services furnished after October 1, 1990. After that date, the inspection, penalty, and safe harbor provisions apply only to a subclass of intermediate care facilities—"intermediate care facilities for the mentally retarded"—and mental hospitals.[3] See Pub. L. No. 100-203, Tit. IV, §§ 4212(d)(1), 4214(a) and (c), 101 Stat. 1330-212, 1330-219. Skilled nursing facilities and intermediate care facilities that were removed from the coverage of the inspection, penalty, and safe harbor provisions are now subject to a different assessment and state certification process. See generally 42 U.S.C. 1396r(b)(3), 1396r(g).

3. The Secretary periodically conducts surveys in a sample of covered facilities to ensure that States are properly performing utilization control inspections. 42 U.S.C. 1396b(g)(2). In May 1988, a federal survey of a sampling of covered facilities in Colorado revealed that petitioner had failed to review

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regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities." 42 U.S.C. 1396d(c) (1982). Intermediate care facilities include institutions for the mentally retarded if they meet certain other conditions. 42 U.S.C. 1396d(d) (1982 & Supp. IV 1986).

[3] Intermediate care facilities for the mentally retarded were formerly included among intermediate care facilities generally. Compare 42 U.S.C. 1396d(d) (1988) with 42 U.S.C. 1396d(d) (1982 & Supp. IV 1986).

the care provided three Medicaid recipients at the Spring Creek Health Care Center in Fort Collins, Colorado. Pet. App. 39-40.[4] Petitioner's "inspection teams charged with performing annual reviews * * * [had] rel[ied] solely on the particular facility's census of Medicaid patients to identify the recipients due for review" and had done nothing further to verify that the facility-provided patient list was accurate. *Id.* at 43. After notification of the error on June 8, 1988, petitioner finally reviewed the patients on June 10, 1988. *Ibid.* On September 19, 1988, the Secretary assessed a penalty against petitioner of $89,428.95 for its failure to perform a satisfactory utilization control inspection for the Spring Creek facility for the quarter ending March 31, 1988. *Id.* at 39.

Petitioner appealed the penalty to the Secretary's Departmental Appeals Board (DAB). Pet. App. 39-54. Petitioner argued that its reliance on the facility's patient census met the statutory "good faith" and "due diligence" safe harbor and that the Secretary "impermissibly restricted the plain meaning of th[at] phrase * * * by tying the exception to events which are 'beyond the control' of the party." *Id.* at 43-44. The DAB rejected petitioner's argument, reasoning that the Secretary's interpretation was reasonable and that petitioner had available other information that it could have used to verify the Spring Creek patient list.[5] *Id.* at 45-54.

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[4] Spring Creek is dually certified as both a skilled nursing facility and an intermediate care facility. Two of the cited recipients were receiving intermediate care facility services and the third was a skilled nursing facility patient. Pet. App. 39-40.

[5] The DAB found that use of Peer Review Organization (PRO) eligibility information "would have enabled [peti-

4. Petitioner filed the instant suit challenging the DAB's decision. On cross-motions for summary judgment, the district court ruled in favor of petitioner. Pet. App. 29-36. Expressly adopting the holding and reasoning of the district court in *Delaware Division of Health & Social Services* v. *HHS*, 665 F. Supp. 1104 (D. Del. 1987), the district court held that Congress intended to adopt a subjective standard for the statutory "good faith"/"due diligence" safe harbor and that petitioner's "inadvertent mistake" met that standard. Pet. App. 33-35.

The court of appeals reversed. Pet. App. 13-23. The court first concluded that the Medicaid statute made clear that "a failure to review a single recipient constitutes a failure to inspect a facility for purposes of the penalty provision." *Id.* at 18-19. Thus, petitioner's "admitted failure to review three recipients at the [Spring Creek] Center * * * represents a failure to inspect that facility" for purposes of the statute. *Ibid.* Turning to an analysis of the safe harbor provision, the court applied the approach outlined in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), and concluded that "Congress did not [directly] address" the meaning of "good faith" and "due diligence" in the statute but rather "implicitly delegated to the Secretary the determination of how 'good faith and due diligence' should be measured." Pet. App. 19-20. The court also concluded that the Secretary's interpretation of that provision was reasonable:

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tioner] to identify as Medicaid eligible at least two of these omitted recipients." Pet. App. 51. The DAB also found that "for purposes of [the Secretary's] validation survey, the State had provided certain recipient billing information which [also] could have been used to verify the facility's census." *Id.* at 52.

> The Act repeatedly expresses the goal that states annually review the care received by *each* Medicaid recipient. We cannot say the regulation's requirement that a state do everything within its control to ensure all eligible facilities are inspected is an unreasonable implementation of the Act's requirement that states exercise "good faith and due diligence" in conducting utilization control inspections. Because the regulation does not contradict the statute's plain language, we uphold the Secretary's interpretation.

Id. at 21.

The court rejected petitioner's argument that a state should be able to avoid the statutory penalty merely by making a subjective good faith effort to conduct the required inspections, concluding that such an approach "would vitiate clearly expressed congressional intent that the care received by each Medicaid recipient be reviewed annually." Pet. App. 21. Thus, the court upheld the penalty assessed by the Secretary in this case, concluding that "[i]f states are permitted to rely on a facility's census, a facility providing inappropriate care will be encouraged simply not to list those patients[,] * * * contrary to the underlying purposes of the Act." *Id.* at 22-23.

ARGUMENT

The reasoning, and perhaps the result, in this case conflict with the recent decision of the Third Circuit in *Pennsylvania Dep't of Public Welfare* v. *HHS*, 928 F.2d 1378, 1385 (1991). That conflict, however, is of limited significance. Recent statutory changes have substantially reduced the number of facilities covered by the inspection, penalty, and safe harbor provisions at issue in this case. It is uncertain whether the problem of failure by States to inspect patients—the problem that raises the legal issues here and in *Pennsylvania Dep't of Public Welfare*—will continue to recur with respect to the remaining covered facilities. Aside from this case, the *Pennsylvania* case, and one case currently pending in each of the Eighth and Eleventh Circuits, we are aware of no other case involving these issues currently pending at an administrative level or in the courts. Consequently, in the absence of further developments indicating that the issue in this case will continue to recur, we do not believe the conflict in the circuits to be of sufficient significance to warrant further review.

1. The court of appeals properly upheld the Secretary's denial of reimbursement to petitioner in this case. Congress mandated that the medical care of each and every Medicaid recipient in covered facilities be reviewed annually. See 42 U.S.C. 1396a (a)(26) and (31), 1396b(g)(1). In light of this statutory mandate, the Secretary reasonably interpreted the "good faith"/"due diligence" safe harbor as requiring successful inspection of each recipient's medical care but for "events beyond [the State's] control which it could not have reasonably anticipated." 42 C.F.R. 456.653(a)(3). As the court

below noted, "to permit a state to avoid the statutory penalty merely because it made a subjective good faith effort to conduct the required inspections would vitiate the clearly expressed congressional intent that the care received by each Medicaid recipient be reviewed annually." Pet. App. 21. The Secretary's interpretation of "good faith" and "due diligence" is reasonable and "not in conflict with the plain language of the statute," and is therefore entitled to deference. *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988); *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843-845 (1984).

Further, on the facts of this case, it was not "virtually impossible," as petitioner claims, for it to have identified the missed Medicaid recipients at the Spring Creek facility. Pet. 9. Indeed, the DAB specifically found that other information was available to petitioner that could have assisted "in accurately identifying all recipients for whom a review was due." See Pet. App. 51-52. Thus, with respect to the missed patients in the Spring Creek facility, petitioner did not exercise "good faith" and "due diligence" in conducting the required review. The court of appeals properly upheld the Secretary's disallowance of funding.

2. Although we believe the court of appeals correctly decided this case, there is a disagreement in the courts of appeals over the proper interpretation of the "good faith"/"due diligence" safe harbor contained in 42 U.S.C. 1396b(g)(4)(B). In this case, the Tenth Circuit upheld the Secretary's implementing regulation requiring full compliance "but for events beyond [the State's] control which it could not have reasonably anticipated." 42 C.F.R. 456.653

(a)(3).[6] The Third Circuit, however, has struck down the Secretary's regulation and adopted a different approach, holding that "the words of the statute require the consideration of both subjective and objective factors in evaluating a state's attempt to inspect facilities." *Pennsylvania Dep't of Public Welfare* v. *HHS*, 928 F.2d 1378, 1385 (1991).[7] Because the Third Circuit remanded the case for an application of its approach, it is uncertain whether application of the Third Circuit's holding will result in a different judgment from that which would have been reached had the approach adopted by the Secretary and affirmed by the Tenth Circuit been applied.

3. Despite the disagreement between the Third and Tenth Circuits, the issue presented in this case is of limited and uncertain continuing significance. We note, first, that it is not an issue reflecting disagreement about obligations to afford treatment to persons under the Medicaid program, but instead is an issue concerning the possibility of limited discrepancies in apportionment of the program's costs between state and federal agencies. And, as we ob-

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[6] The Secretary's interpretation has also been upheld by the United States District Court for the Northern District of Georgia. *Johnson* v. *Sullivan*, 758 F. Supp. 1496, 1501-1503 (1991), appeal pending *sub nom. Toal* v. *Sullivan*, No. 91-6823 (11th Cir.).

[7] Two district courts have struck down the Secretary's regulation as inconsistent with the statute and adopted a solely subjective test, concluding that Congress in the Medicaid Act "plainly directed the Secretary to employ a subjective standard that focuses [solely] on the State's good faith" in conducting the required review. *Delaware Division of Health & Social Services* v. *HHS*, 665 F. Supp. 1104, 1124 (D. Del. 1987); *Arkansas* v. *Sullivan*, No. LR-C-88-793 (E.D. Ark. Oct. 18, 1990), appeal pending, No. 90-3100EA (8th Cir.).

served above, the 1987 Omnibus Budget Reconciliation Act amended the Medicaid Act in two respects pertinent to the present controversy. First, the 1987 OBRA limited the applicability of the "good faith"/"due diligence" safe harbor to "intermediate care facilities for the mentally retarded" (ICFMRs) and mental hospitals. See Pub. L. No. 100-203, Tit. IV, § 4212(d)(1), 101 Stat. 1330-212. Second, in place of the instant provision, Congress substituted an individualized assessment and state certification process for skilled nursing facilities and intermediate care facilities no longer covered by the provisions at issue here. Pub. L. No. 100-203, Tit. IV, § 4202, 101 Stat. 1330-174 to 1330-179, codified at 42 U.S.C. 1396r(g). See H.R. Rep. No. 391, 100th Cong., 1st Sess. 465-470 (1987) description of new assessment and certification process). The amendments are effective for all services provided on or after October 1, 1990, Pub. L. No. 100-203, Tit. IV, § 4214(a) and (c), 101 Stat. 1330-219 to 1330-220, as amended by Pub. L. No. 100-360, Tit. IV, § 411(*l*)(10), 102 Stat. 806.

As petitioner recognizes (Pet. 9 n.1), the amendments limit the future impact of the circuit conflict over the construction of the "good faith"/"due diligence" safe harbor. We are informed that approximately 22,000 institutions nationwide were covered by the inspection, penalty, and safe harbor provisions prior to the statutory change. That number has now been reduced to approximately 6600 institutions, of which approximately 6000 are intermediate care facilities for the mentally retarded. Although there are some 151,000 patients in such facilities, approximately 60% of the facilities are quite small, with patient populations of 8 or fewer patients each, and the proportion of such small institutions has been rapidly increasing.

In light of those facts, it is uncertain whether the legal issue on which the Third and Tenth Circuits disagree will continue to arise in the future. The "good faith"/"due diligence" safe harbor, whose meaning is the subject of the disagreement, is invoked only when a State has failed to inspect a covered facility. Because of the reduced number of covered facilities and the generally small size of those that remain, the problem of missed inspections—which has never been particularly widespread—may cease to arise or may arise only in a very small number of cases. We are aware of no cases raising this issue now pending before the Departmental Appeals Board, nor are there any cases pending in the courts aside from this case, the *Commonwealth of Pennsylvania* case, and the two cases now pending in the Eighth and Eleventh Circuits, *Arkansas* v. *Sullivan*, No. 90-3100EA (8th Cir.), and *Toal* v. *Sullivan*, No. 91-8623 (11th Cir.).

Moreover, in both *Pennsylvania Dep't of Public Welfare* and this case, the State failed to complete its inspections because it used facility-provided lists to determine which patients must be inspected. See Pet. App. 17; *Pennsylvania Dep't of Public Welfare*, 928 F.2d at 1378; see also *Johnson* v. *Sullivan*, 758 F. Supp. 1496, 1502 (N.D. Ga. 1991) (missed inspection due to use of facility-provided list), appeal pending, No. 91-8623 (11th Cir.). The difficulties of using facility-provided lists thus have now been highlighted by both the Third and Tenth Circuit decisions. In addition, HHS has taken steps to inform the States that facility-provided lists may be unreliable.[8]

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[8] In a manual transmitted to state agencies administering the Medicaid program, HHS has instructed: "You are responsible for identifying recipients for review, therefore do

In light of those facts, it is doubtful that a State that failed to inspect a facility in the future because it relied on a facility-provided list could be found to have exercised "due diligence," regardless of how that term is interpreted.

Consequently, although we recognize that the Third and Tenth Circuits have adopted divergent approaches to the statute and the regulations adopted thereunder, the continuing significance of the issue on which the two circuits have disagreed is in doubt. Accordingly, we do not believe that the issue is of sufficient importance at this time to warrant further review by this Court. Should further developments indicate that the difference between the approaches adopted by the two circuits will have a continuing impact on future cases, review by this Court could then be sought.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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not rely on eligibility input from the facility." State Medicaid Manual, Pt. 9 (Utilization Control), Transmittal No. 4, § 9155 (Jan. 1988).

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